

**TOWN OF GRANBY
PLANNING AND ZONING COMMISSION
APRIL 10, 2012
MINUTES**

Present: Paula Johnson Chairwoman, Margaret Chapple, Charles Kraiza, Paul Lambert, Eric Lukingbeal, James Sansone and Linda Spevacek, Francis Armentano, Director of Community Development was also in attendance.

The meeting opened at 7:01 p.m.

Public session: There was no public comment.

ON A MOTION by Paul Lambert, seconded by Charles Kraiza, the Commission voted to approve the minutes of March 13, 2012. All approved.

Old Business:

James Sansone and Charles Kraiza abstained from the Commission discussion concerning an application seeking a Special Permit under Section 3.1.2.4 of the Zoning Regulations to establish a recreation area for the riding of a dirt bike in a residential R50 zone for property located at 18 Candlewood Lane, File Z-16-11. Eric Lukingbeal summarized the facts and the status of the situation at this point and submitted a copy of a Draft Decision for the minutes. The Commission members continued the discussion concerning the application and reasons for denial. Paul Lambert spoke in favor of approving this application.

ON A MOTION by Eric Lukingbeal, seconded by Margaret Chapple, the Commission voted to deny an application seeking a Special Permit under Section 3.1.2.4 of the Zoning Regulations to establish a recreation area for the riding of a dirt bike in a residential R50 zone for property located at 18 Candlewood Lane, File Z-16-11 as follows:

The main reason for denial of the permit is that the particular regulation (Section 3.1.2.4) was never intended for the use proposed here. First, the uses described in the regulation (golf courses, playgrounds, recreational areas and parks) all contemplate usage by groups of persons. The use here is for a single person, Dylan Cavaciuti. Second, the uses described in the regulation do not involve any noise-generating motorized uses. They are all passive uses.

A second reason for denial is that the Commission is uncomfortable licensing an activity that some in the community feel is, or may be, a nuisance. What activity is a nuisance on one property may not be on another property. What is a nuisance to one person may not be to another. It is up to a court of law to make the determination of what constitutes a nuisance. The Commission believes it ought not be deciding what is or is not, a nuisance. Instead, the Commission believes that the community is better left to the law of nuisance as a remedy, and to the efforts of neighbors to work out private solutions. The Draft Decision will be attached to the minutes.

Commission members Paula Johnson, Margaret Chapple Eric Lukingbeal, Linda Spevacek voted to deny the application and Paul Lambert opposed the decision. James Sansone and Charles Kraiza abstained.

Chairwoman Johnson suggested a Sub-committee be formed to come up with ideas to solve this problem. Margaret Chapple suggested giving more guidance to the Zoning Enforcement Officer. Chairwoman Johnson asked Margaret Chapple and Paul Lambert to work on this committee and to advertise for members from the public to also be a part of this committee.

Receive applications:

There are no applications at this time.

Staff Reports and Correspondence:

Fran noted he is updating the State Plan of Conservation and Development and will be working with the Capital Region Council of Governments.

Fran commented that Hesketh & Associates is doing an access analysis of Salmon Brook Park. It appears there will be a Farmer's Market 1 day a week at the YMCA.

Commission discussion of items of interest or concern:

Commission members noted the new restaurant located at Mill Pond Drive is open.

The meeting adjourned at 7:29 p.m.

Respectfully submitted,

Dorcus S. Forsyth
Recording Secretary

GRANBY PLANNING & ZONING COMMISSION

APPLICATION FOR SPECIAL PERMIT TO ESTABLISH A
RECREATIONAL AREA IN AN R50 ZONE – 18 CANDLEWOOD LANE

DRAFT DECISION

NOTE: This is a draft decision by a single commission member, Eric Lukingbeal. It is not the commission's decision. It is intended to provoke discussion among the commission members.

FACTS

Some of the facts are summarized in Fran Armentano's February 23, 2012 memorandum to the Commission. The Commission heard testimony from the applicant, Tracy Cavaciuti, and from a dozen or so members of the public during a public hearing on March 13, 2012. It also received a letter from Attorney Stephen Morelli, who represents James and Susan Gnesda. Mrs. Gnesda also testified at the public hearing. The Commission made a site visit on February 18, 2012. Four members of the Commission walked the site, and observed the dirt bike (an 85 cc. two-stroke Kawasaki) operated by the applicant's son, Dylan. The applicant also submitted a copy of a petition signed by several neighbors.

While some of the facts are disputed – particularly the intensity and frequency of noise and dust in the past several years – there does not appear to be any dispute about the following facts.

1. The application for a special permit is made under Section 3.1.2.4 of the zoning regulations. This section applies to special permits for a "recreational area," which are described as "golf courses, playgrounds, recreational areas and parks."
2. The application proposes that only one person, Dylan Cavaciuti, will ride the Kawasaki dirt bike, and he will ride it during certain limited times, for limited total times on each day. (Two hours per day total on three weekdays, and two hours per day total on two Saturdays per month.)
3. The application proposes that the only dirt bike which will be ridden is the 85 cc Kawasaki.
4. The applicant has been unable to agree on appropriate time limitations for operation of the dirt bike, with her neighbor, Mrs. Gnesda. Mrs. Gnesda's property abuts the applicant's property.

5. Mrs. Gnesda has complained to the Granby Police Department on at least one occasion as early as 2010, and to the CT Department of Environmental Protection. The CTDEP issued an "Inspection Report" concerning its May 17, 2011 inspection. It took no action.
6. The Town has received complaints regarding the use of dirt bikes on the Cavaciuti property from neighboring properties. Genesda, 20 Candlewood Lane and Klein, 19 Candlewood Lane. The Town has also received a letter dated 5/21/2011 from James, Tracy and Dylan Cavaciuti which is signed by various area homeowners supporting the Cavaciuti's use of their property.
7. The Granby Zoning Enforcement Officer issued a Cease and Desist Order on May 17, 2011, ordering that the operation of dirt bikes on the Cavaciuti property cease. The Cavaciutis appealed that decision to the Zoning Board of Appeals, which upheld the ZEO's decision. The Cavaciutis have since appealed the ZBA's decision to the Superior Court, where it remains pending. It is uncertain when the court might issue a decision. While the ZBA's decision is not a part of the record before this Commission, the Commission notes that the Zoning Enforcement Officer issued a Cease and Desist Order for "the riding of dirt bikes and the creation of a riding track." In the order, the ZEO notes complaints from neighbors who express concerns for noise, dust and fumes and who state that the activity "interferes with the peaceful enjoyment of their property and tht the noise impacts their overall health and well being." The ZBA adopted "the position of the ZEO and will not overturn his cease and desist order."
8. The Cavaciuti Candlewood Lane property is seven acres; the cleared field, on which a rough circular track with several dirt mounds or jumps have been built, is about five acres.

DECISION

The application for a special permit is denied.

Since this application has attracted considerable public interest in the press, and since dirt bike riding (along with quads, ATVs and snowmobiles) both on and off private residential properties is known to occur in various locations within the Town of Granby, the commission believes it will be useful to explain its decision. The Commission does so in order to increase public understanding of the issue.

The main reason for denial of the permit is that the particular regulation (Section 3.1.2.4) was never intended for the use proposed here. First, the uses described in the regulation (golf courses, playgrounds, recreational areas and parks) all contemplate usage by groups of persons. The use here is for a single

person, Dylan Cavaciuti. Second, the uses described in the regulation do not involve any noise-generating motorized uses. They are all passive uses.

A second reason for denial is that the Commission is uncomfortable licensing an activity that some in the community feel is, or may be, a nuisance. What activity is a nuisance on one property may not be on another property. What is a nuisance to one person may not be to another. It is up to a court of law to make the determination of what constitutes a nuisance. The Commission believes it ought not be deciding what is or is not, a nuisance. Instead, the Commission believes that the community is better left to the law of nuisance as a remedy, and to the efforts of neighbors to work out private solutions.

The Commission notes that the applicant and her attorney came to the Commission on an informal basis, and asked if an application for a special permit under the regulations could be made. Upon reflection, perhaps the Commission ought to have discouraged the application for a special permit. The Commission regrets that it did not do more to point out the risk that it might interpret the regulation as inapplicable to a single dirt bike user on his own property.

In denying the application, the Commission makes no finding whether or not the operation of the dirt bike on the property is a nuisance.

Where does this leave the applicant? And, where does this leave other owners of land who may wish to ride dirt bikes, or allow others to do so, on their own land?

The Applicant. The applicant is under a Cease and Desist Order. If the applicant's court appeal is unsuccessful, that order will remain in effect. Of course, if it is overturned, then the applicant's son will be able to ride, subject only to the limitations (if any) imposed by the common law of nuisance.

Other Landowners. The order issued by the Zoning Enforcement Officer against the applicant here does not apply to any other landowners. It only applies to the Cavaciuti property. But, it is probably reasonable to suppose that under similar circumstances the ZEO might take similar action, and issue a cease and desist order.

What is the Common Law of Nuisance? As an aid in understanding the Commission's ruling in this case, the Commission feels that a brief summary of the common law of nuisance in Connecticut would be helpful. The common law of private nuisance in Connecticut allows those injured in the enjoyment of their property by the activities of others to sue, either for damages, or for an injunction, or both. To be more precise, the plaintiff must prove that the defendant's conduct caused an unreasonable interference with the plaintiff's use and enjoyment of his or her property. Whether the interference is unreasonable or not involves a balancing of the interests,

considering all the relevant factors. These include the nature of the interfering use and the enjoyment invaded, the nature, extent and duration of the interference, the suitability for the locality of both the interfering conduct and the particular use and enjoyment invaded, whether the defendant is taking all feasible precautions to avoid unnecessary interference with the plaintiff's use and enjoyment of his or her property, and any other factors the fact finder (a judge or jury) deems relevant.

No one factor should determine the outcome; all the relevant factors should be considered.

In 2002, the Connecticut Supreme Court clarified and restated the law of private nuisance. The language summarized above is from that case (Pestey v. Cushman, 259 Conn. 345 (2002)). It may be helpful to point out several other things the court pointed out in its decision.

1. "...some level of interference is inherent in modern society. There are few, if any, places remaining where an individual may rest assured that he will be able to use and enjoy his property free from all interference."
2. "The interference must be substantial to be unreasonable."
3. "Ultimately, the question of reasonableness is whether the interference is beyond that which the plaintiff should bear, under all the circumstances ...without being compensated."
4. "A use which is permitted or even required by law and which does not violate local land use restrictions may nonetheless be unreasonable and create a common law nuisance."

There are many examples of activities which courts here and in other states have found to be nuisances. Among them are: operation of a sewage treatment plant which emitted odors and insects; a cement plant emitting dust and fumes; and a farm generating odors from an undersized manure digester.

What does this all mean? What it means is that even if the Cavaciuti application was approved by the commission, she could still be subject to a common law nuisance lawsuit by a neighbor. A permit is no defense to a nuisance suit.

The Future The Commission knows that the issue of dirt biking is not going to go away. We do have some suggestions.

Since we are deciding that our present regulations are not meant for this kind of application, and since the ZEO has issued and Cease and Desist Order in the Cavaciuti matter, this may appear to leave dirt bike riders with no good alternatives. But, that is not quite accurate.

First, the zoning regulations can be changed. Anyone can submit a proposal (and pay a required fee) to amend the regulations. A regulation that would clearly apply to dirt biking on owned residential property could be drafted. A regulation could also be drafted which would in effect reverse the

ZEO's decision. A new zoning regulation could say that dirt bikes are a permitted use, and a proper accessory use, on some or all residential property in Granby. A regulation could also limit hours of operation, and numbers of riders at any one time. Whether this commission would approve a change is uncertain. We have already expressed our reluctance to get in the business of licensing a potential nuisance, even though our approval would not prevent a neighbor from suing. Just to be clear, anyone can submit a proposed regulation (along with the fee), and the commission must then hold a public hearing, and either approve, deny, or modify the proposed change.

A second suggestion is that the zoning regulations could facilitate resolution of disputes related to dirt biking. Some may remember that when Granby's animal regulations were liberalized in the late 1980's, the commission appointed several individuals to serve as volunteer, unpaid mediators where neighbors disputed the management of animals. On several occasions, disputes were successfully mediated. There was no involvement of Granby's ZEO or police, and there were no lawsuits. We think that the same thing could be done now with respect to dirt bikes (and quads, snowmobiles, etc.).

Of course, neighbors are always free to resolve their potential disputes by talking with each other. We encourage them to do so whenever possible. It is the reasonable thing to do, and often by far the most cost effective.

In the past, this commission has set up workshops, and appointed advisory committees composed of volunteers (which also involved a few commission members) to study issues of concern, and make recommendations to the commission for regulation changes. We did this with respect to signs, and also with respect to our animal regulations. We could do this with respect to dirt bikes, and we will decide soon whether to do so, or not.

While we would like to end on a positive note, we are forced to observe that the issue generates strong passions on both sides. There is probably no regulatory solution which will satisfy everyone. The commission is, however, willing to set up an advisory committee, should the public think it is a reasonable course, and provided there are volunteers.